No. 22,573

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MILLER REDWOOD COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

JANET KOHN,
HERBERT FISHGOLD,
Attorneys,

National Labor Relations Board.

INDEX

AUTHORITIES CITED

Page

Page

Page

STATUTE:

MISCELLANEOUS:

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,573

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MILLER REDWOOD COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order issued against respondent on May 5, 1967. The

[1] The pertinent provisions of the Act are reprinted in Appendix A, *infra,* pp. A1-A2.

Board's decision and order (R. 28-34, 13-23)[2] are reported at 164 NLRB No. 52. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Crescent City, California, where respondent operates a lumber mill.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the respondent violated Section 8(a)(1) of the Act by interrogations, threats, promises, grants of benefits, and creating the impression of surveillance of employees' organizational activities. The Board also found that the respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Davis. The facts upon which the Board's findings are based are summarized below.

A. The advent of the Union; the Company's anti-union campaign begins

The Union's[3] organizational activities among the Company's employees commenced in April 1965, with several union meetings being held and union cards passed out and signed (Tr. 9-10). On May 28,[4] Darrell Schroeder, the General Manager at the mill operation, received a letter from the Union asserting majority status and requesting recognition

---

[2] References designated "R." are to Volume I of the record as reproduced, pursuant to Rule 10 of this Court. "Tr." refers to the portions of the stenographic transcript of the unfair labor practice hearing, reproduced pursuant to Court Rules 10 and 17. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "G.C. Exh." and "R. Exh." are to exhibits of the General Counsel and respondent respectively.

[3] The United Brotherhood of Carpenters & Joiners of America, AFL-CIO.

[4] All the events herein occurred in 1965.

(R. 14; Tr. 172, G.C. Exh. 3).[5] That same day, in the presence of 4 or 5 of the employees, Schroeder declared that if he "found out who was starting it [the Union], they would be out" (R. 16; Tr. 89, 90, 92).

With the Union's request at hand, the Company began to inquire about the Union and the employees' interest therein. In early June, sawmill foreman Connor asked employee James Lynch whether he knew anything about the Union coming in. Lynch replied that he did not and that he did not care whether it came in or not. Connor responded, "Well, I care because I would probably lose my job." (R. 16; Tr. 99). Connor then asked whether Lynch knew of "anyone else" trying to get the Union in, to which Lynch answered that he did not (*Ibid.*).

Subsequently, on June 11, Schroeder spoke with employee Leroy Roberts, a leadman on the green chain operation, and, in relation to the current union campaign, inquired of Roberts why the men were dissatisfied. When Roberts expressed ignorance, Schroeder asked further if there was any complaint about a health and welfare program. Roberts replied that he did not know, that he,himself, was satisfied. Schroeder then said that a new insurance plan, equal to any then in effect in the locality and to any offered by any union, along with a retirement program, would soon be explained to the men (R. 14; Tr. 175-177).

B. The Company attempts to influence union adherent Jerry Davis

Employee Jerry Davis was very active in behalf of the Union: he signed a union card, passed out cards to other employees and attended union meetings (R. 15; Tr. 9-11). At a social occasion on June 5, Davis discussed his interest in the Union with John Womack, who was not then employed by the Company (R. 15; Tr. 12-13). About a week later, Womack became a foreman at the Company's mill (R. 15; Tr. 325, 329,

---

[5] Schroeder testified that on the same day he telephoned Roy Glassow, a representative of an organization which represents and advises timber

(Continued)

175). In mid-June, while Davis was in Superintendent Eichar's office, Eichar asked him about the men signing union cards (R. 15; Tr. 13-14). Davis acknowledged his interest in the Union and stated that he felt that the Union "would give us a lot better health and welfare plan" (R. 15; Tr. 14). Eichar asserted that a union would interfere with Davis' promotions, and lessen his chances of becoming a foreman (R. 15; Tr. 14-15). Davis would have a better future "going with the Company [rather] than with the Union," said Eichar, "you won't have near the advancements if you vote the wrong way" (R. 15, 17; Tr. 16). Eichar then asked Davis if he would like to discuss the matter further with Schroeder, and Davis replied that he would, so that he could get both the company and the union sides of the story (R. 15; Tr. 16).

About a week later, Davis was called to Schroeder's office, at which time the Union was again discussed. Davis told Schroeder that some of the men felt that they had no job security; Schroeder, in response, assured Davis that his job was secure (R. 15; Tr. 17). When Davis alluded to the firing of several employees who had asked for a small pay increase, Schroeder suggested that "they didn't ask for it in the right way" — that they had "asked for a nickel raise or else" (R. 15; Tr. 17-18). Schroeder noted that "there are two sides to every story" (R. 15; Tr. 18).

Davis then raised the subject of vacations (*Ibid.*). The employees in the mill understood that they earned no vacation credits unless their period of employment extended from June 1 of one year through the following May 31, and in that 12 months they worked at least 1400 hours (R. 14; Tr. 18, 19-20, 317-318, 320). Davis had worked less than a year and had put in only 1355 hours (R. 15; Tr. 18). Now, however, Schroeder informed Davis that he and several other employees

---

(footnote 5 continued)
operators in labor matters, and that Glassow cautioned against supervisors mentioning the Union to the employees (R 14; Tr.173-174). A few days later, Schroeder instructed Superintendent Dale Eichar not to make threats about the Union, and on June 14, Glassow himself told the supervisors what they could and could not lawfully do in the presence of union organizing (R. 14; Tr. 175, 177-178, R. Exh. 3).

would soon be given a vacation allowance (*Ibid.*). When Davis inquired about the health and welfare plan, Schroeder said that he would have a man come to the mill to explain it to the employees (*Ibid.*).

Concluding the interview, Schroeder told Davis that he knew that about 13 of the men had been attending union meetings and that "I know who they are. I have the license numbers" of their cars (R. 15; Tr. 19).

Subsequently, Eichar asked Davis how his talk with Schroeder went, and inquired if Davis "had made up [his] mind how [he] was going to vote" (R. 15; Tr. 20-21). When Davis replied that he had not, Eichar quickly added, "I would advise you not to vote for the Union" (R. 15; Tr. 21).

In keeping with his promise, Schroeder granted vacation benefits on a pro rata basis to 11 employees, including Davis, who had not worked the requisite time for the regular, full vacation (R. 14; Tr. 178-180, R. Exh. 4). During the week of June 21, Schroeder, who had not previously discussed the new pro rata system with the employees, called each of the recipients individually to the office to inform him of his vacation credit (R. 14; Tr. 193-194).

C. Jerry Davis is discharged

Jerry Davis began his employment with the Company as a laborer in October 1964 (R. 14; Tr. 8). He progressed quickly within the Company: in November 1964 he was assigned as a "jump roll" operator at the same hourly rate of $2.41; late in February he was moved to the "pony edger" and given an increase of 15¢ per hour; on March 1 he became the operator of the gang trim saw, with a further hourly increase of 20¢ to $2.76 (R. 14; Tr. 8-9).[6] Davis initially experienced

[6] The function of the trim saw operator is to make a judgment, as the rough lumber moves along the belt approaching the saws, as to which of the boards are suitable for lumber, and then to trim such boards to optimum lengths. If a board coming to the saws is obviously unsuitable for manufacture into finished lumber because of rot or other serious defect,

(Continued)

some mechanical problems and, in accordance with company instructions to sound the mill whistle to signal the millwright or the electrician for aid, often signaled for help (R. 17; Tr. 204-205). Millwright Hartwig complained about this to Eichar and it soon ended (R. 17; Tr. 112, 204-205). In mid-May Davis' wage rose to $2.91 and, a month later, as the result of a blanket wage rise, his rate became $2.97 (R. 14-15; Tr. 8-9). Davis' supervisors considered him a capable worker. Eichar once commented that Davis was undertrimming but was doing it "about" right (R. 17; Tr. 22, 379). Connor had occasion to tell Davis that though he was new at the job, he was doing very well (R. 17; Tr. 23, 238).[7]

In early July, when the mill closed for a week, Davis asked to be included in a cleanup crew that was assigned to do some extra work (R. 15; Tr. 374). Eichar assented to the request, explaining that he was giving the vacation work to the "key men" (R. 15; Tr. 374-375). Davis worked only 2 days during the mill shut down and then took the 3 days vacation he had been granted by Schroeder (R. 19; Tr. 19-20, 45, 375-376). When Davis returned to work on July 12, Connor offered him the job as "gang edger," and Davis accepted (R. 19; Tr. 21). However, he was not immediately assigned to that position, and at the time of his discharge four days later, Davis was still operating the trim saw (R. 18; Tr. 8, 21).

On July 16, at the end of his shift, Davis was handed his check by Connor and told that he was being discharged (R. 18; Tr. 246). When Davis asked for a reason, Connor told

---

(footnote 6 continued)
the saws are dropped to allow the unsuitable boards, trimmed to worthless 2-foot lengths, to drop to a lower belt so that they do not proceed to the next finishing operation. (R. 17; Tr. 167-168.)

[7] While in Schroeder's office in June, Davis commented that some of the men resented his being advanced so rapidly, but Schroeder assured him that "at [the] time [he was] the only qualified man . . . and the most eligible to receive it" (R. 15; Tr. 18-19).

him that he had been a "big problem" (R. 18; Tr. 250-251). Davis then asked Connor if Schroeder had fired him, and Connor replied, "I can't commit myself, you talk too much on the job" (R. 18; Tr. 22).[8] At the hearing, Connor asserted that Davis had been discharged because he had been observed deliberately "slashing" lumber (cutting all boards into two foot unusable lengths) (R. 18; Tr. 250-251). The Trial Examiner expressly discredited Connor's and Millwright Hartwig's testimony that they had watched Davis deliberately destroy some 6000 board feet of lumber (R. 18-19; Tr. 210-211, 249).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, found that the Company interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act by interrogation, threats, promises, the granting of benefits, and creating the impression of surveillance (R. 28). And disagreeing with the Examiner's conclusion that the General Counsel had failed prima facie to establish that Davis was discharged because of his union activity, the Board found that the Company discharged Davis in violation of Section 8(a)(3) of the Act (R. 29-30).[9]

The Board's order directs the Company to cease and desist from the unfair labor practices found, from discouraging

---

[8] According to Schroeder, Connor told him that Davis was being fired for overtrimming, undertrimming and slashing (R. 18; Tr. 185-186).

[9] The Board further found, in agreement with the Trial Examiner, that the discharge of Leroy Roberts did not violate the Act (R. 30).

membership in the Carpenters Union or in any other labor organization by discharging or in any other manner discriminating against any individual, and from in any other manner interfering with employees' statutory rights (R. 32). Affirmatively, the Company is required to offer Davis immediate and full reinstatement; to make him whole for any loss of earnings;and to post the appropriate notices (R. 32-33).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES IN THE EXERCISE OF THEIR STATUTORY RIGHTS, IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

The record reveals that upon learning of the Union's claim to represent the employees, the Company initiated a campaign of interrogation, threats of reprisal, promises and granting of benefits, and suggestions of surveillance, all designed to intimidate the employees and influence them to renounce their support of and adherence to the Union. Thus, almost immediately after receiving the Union's letter of May 28 requesting recognition, Schroeder, the Company's general manager, declared that if he "found out who was starting [the Union], they would be out" (Tr. 89). A few days later, sawmill foreman Connor questioned employee Lynch as to his knowledge of the Union and whether other employees were active, and added that he (Connor) was concerned "because I would probably lose my job" (Tr. 99). In mid-June, Mill Superintendent Eichar remarked to employee Davis that it was "rumored" some of the men were signing union cards, and when Davis responded by avowing support for the Union, Eichar told him that belonging to the Union could interfere with his promotions, suggesting that advancements would not be as frequent "if you vote the wrong way" (Tr. 16). Eichar again approached Davis after the latter's conversation with

Schroeder on the twin topics of employment conditions and the Union, and after asking Davis if he had made up his mind how he was going to vote, advised Davis not to vote for the Union (*supra,* p. 5). During this same period, Schroeder queried employee Roberts as to the sources of employee dissatisfaction, at the same time holding out the promise of new benefits to be provided by the Company (*supra,* p. 3).

That the foregoing conduct constituted unlawful interference, restraint and coercion within the meaning of Section 8(a)(1) of the Act is clear.[10] Before the Board, the Company's disagreement with the facts as found raised only questions of credibility, which are matters for the Trial Examiner and the Board, absent extraordinary circumstances not present here. See *N.L.R.B. v. Luisi Truck Lines, supra,* 384 F.2d at 846; *R.J. Lison Co., Inc. v. N.L.R.B.,* 379 F.2d 814, 817-818 (C.A. 9); *N.L.R.B. v. Thrifty Supply Co.,* 364 F.2d 508, 509 (C.A. 9); *N.L.R.B. v. Radcliffe,* 211 F.2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833.[11]

---

[10] Interrogating employees about their union sympathies: *N.L.R.B. v. Luisi Truck Lines,* 384 F.2d 842, 845 (C.A. 9); *N.L.R.B. v. Security Plating Co.,* 356 F.2d 725, 728 (C.A. 9). Threatening reprisals for union activities: *N.L.R.B. v. Ambrose Distributing Co.,* 358 F.2d 319, 320-321 (C.A. 9), cert. denied, 385 U.S. 838; *N.L.R.B. v. Kit Mfg. Co.,* 292 F.2d 686, 690 (C.A. 9); *N.L.R.B. v. Sebastopol Apple Growers Union,* 269 F.2d 705, 708 (C.A. 9).

[11] The Company did make a separate argument with respect to Connor's questioning of employee Lynch, which it contended was merely an expression of opinion and constituted an isolated incident. However, this conduct occurred in conjunction with the Company's efforts to dissipate the Union's support by other interrogation, threats of reprisal, and promises of benefit. In this context of expressed hostility toward the Union, the Board could reasonably find that the Company's efforts to discover the extent of union support tended to coerce, restrain and interfere with the employees' exercise of their statutory rights. See *N.L.R.B. v. Camco, Inc.,* 340 F.2d 803, 805-807 (C.A. 5), cert. denied, 382 U.S. 926. And on this record, the incident was hardly isolated.

The fact that the supervisors were instructed not to engage in coercive conduct cannot absolve the Company of responsibility. Statements and actions of company supervisors are attributable to the Company despite managerial instructions to refrain from such action. *N.L.R.B. v. Neuhoff Bros. Packers, Inc.*, 375 F.2d 372, 376 (C.A. 5); *Hendrix Mfg. Co., Inc. v. N.L.R.B.*, 321 F.2d 100, 104 (C.A. 5). Declarations made by supervisory employees will be attributed to an employer under the Act when "employees would have just cause to believe that [the supervisors were] acting for and on behalf of the company." *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 179 (C.A. 2), and cases cited therein. "It is what [they] said or did, not what [they were] told to say, do, or not say or do, that counts." *Hendrix Mfg. Co., Inc. v. N.L.R.B., supra.* Here, the employees can hardly have thought that their supervisors were acting contrary to company policy, for, whatever instruction the supervisors may have been given, there is no evidence that the employees knew of these and in fact, the Company's top management participated directly in unlawful conduct.

Thus, the record shows that in addition to the above threats and interrogations, General Manager Schroeder created the impression that the employees' union activities were under surveillance. During his conversation with Davis in June, Schroeder said that he knew that about 13 of the men had been attending union meetings and that he had the license number of their cars. The Board properly concluded that such statements, which lead employees to believe that their employer is keeping their union activities under surveillance, coerce or restrain the employees in violation of Section 8(a)(1) of the Act. See, *N.L.R.B. v. Security Plating Co., Inc.*, 356 F.2d 725, 728 (C.A. 9); *Hendrix Mfg. Co., Inc. v. N.L.R.B., supra,* 321 F.2d at 104 n. 7; *N.L.R.B. v. Prince Macaroni Mfg. Co.*, 329 F.2d 803, 805-806 (C.A. 1); *N.L.R.B. v. S & H Grossinger's, Inc.*, 372 F.2d 26, 28 (C.A. 2); *Int'l. Union of Electrical, etc. Workers v. N.L.R.B.*, 352 F.2d 361, 362 (C.A.D.C.), cert. denied, 382 U.S. 902, enforcing 147 NLRB 809, 820 (statement that Company knew who signed cards);

N.L.R.B. v. Gotham Shoe Mfg. Co., 359 F.2d 684, 685 (C.A. 2), enforcing 149 NLRB 862, 869-870 (statement that Company knew how many employees attended a union meeting).

In addition, the Company attempted to undercut the Union's campaign by promises and grants of economic benefits. After asking Roberts in mid-June why the men were "unsatisfied so that they would have to consider other actions," Schroeder mentioned the health and welfare program and then promised that a new insurance plan, equal to any then in effect in the locality and to any offered by any union, would soon be explained to the men along with a retirement program (see *supra,* p. 3). During the week of June 21, Schroeder informed 11 employees that he would grant them vacation credits on a pro rata basis even though they lacked the requisite hours. Such promises of benefits during an election campaign, seeking to demonstrate to the employees that they could have their wants satisfied without a union, are clearly a violation of Section 8(a)(1) of the Act. *N.L.R.B. v. Security Plating Co., supra,* 356 F.2d at 728 (C.A. 9); *N.L.R.B. v. Kit Mfg. Co., supra,* 292 F.2d at 690 (C.A. 9). Though the Company's vacation policy is not precisely described in the record, it appears, as the Trial Examiner found, that the employees in the mill believed that they earned no vacation credits unless their period of employment extended from June 1 of one year through the following May 31, and that in that 12 months they worked at least 1400 hours. Schroeder as a witness claimed that he decided to grant these pro rata vacation credits because a similar arrangement had sometime earlier been reached at another of the Company's operations (Tr. 179-181, 192). However, as the Examiner pointed out in rejecting Schroeder's explanation, the timing of the granting of the vacations and the fact that the matter had not been raised by the employees warranted the inference that the Company "was motivated by a desire to dilute interest in the Union" (R. 16). The conferring of economic benefit in order to inhibit employee support for

a union violates Section 8(a)(1) of the Act. *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405; *J.C. Penney Co., Inc. v. N.L.R.B.*, 384 F.2d 479, 485 (C.A. 10); *American Sanitary Products Co. v. N.L.R.B.*, 382 F.2d 53, 57-58 (C.A. 10); *Betts Baking Co. v. N.L.R.B.*, 380 F.2d 199, 203 (C.A. 10); *N.L.R.B. v. Yokell*, 387 F.2d 751, 755-756 (C.A. 2).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE DAVIS BECAUSE OF HIS UNION ACTIVITY

Some six weeks after learning of employee union activity, the Company discharged Jerry Davis, an active union adherent and previously a valued employee. Although the Company contended that the discharge was for valid cause, the Board found that Davis was discharged because of his unionism.[12] This Court has recognized that the determinative question in cases such as this is one of fact – i.e., what was the "actual motive" for the discharge. *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9). In determining this question, the Board is entitled to rely on circumstantial as well as direct evidence, and its inference of motivation must stand where it is reasonable and supported by substantial evidence on the record considered as a whole.

[12] That the Board disagreed with the Trial Examiner's ultimate conclusion as to Davis does not detract from the substantiality of the support for the Board's result. The Examiner's resolution of conflicting testimony was not disturbed. The disagreement related solely to the inferences to be drawn from the whole record and the proper application of the statute. In such a case, "the presumptively broader gauge and experience of members of the Board have a meaningful role." *Oil, Chemical & Atomic Workers Int'l Union, Local 4-243 v. N.L.R.B.*, 362 F.2d 943, 946 (C.A.D.C.). Accord: *F.C.C. v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364; *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496; *Cheney California Lumber Co. v. N.L.R.B.*, 319 F.2d 375, 377 (C.A. 9). Cf. *N.L.R.B. v. Tom Johnson, Inc.*, 378 F.2d 342, 343-344 (C.A. 9).

Universal Camera Corp. v. N.L.R.B., supra, 340 U.S. at 488.[13] As has been repeatedly recognized, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *N.L.R.B. v. Walton Mfg. Co.,* 369 U.S. 404, 405. Accord: *Aeronca Mfg. Co. v. N.L.R.B.,* 385 F.2d 724, 727 (C.A. 9); *Shattuck Denn Mining Corp., supra,* 362 F.2d at 469-470. We show below that under these settled principles the Board's decision here is supported by the record and entitled to enforcement.

Davis began his employment with the Company as a laborer in October 1964 and, as shown *supra,* pp. 5-6, he made rapid advancement along the promotional ladder. Both Superintendent Eichar and Foreman Connor admitted at the hearing that Davis generally did a good job (Tr. 238, 379). When Davis remarked to Schroeder, during their June conversation, that some of the men resented the fact that he (Davis) had been promoted so rapidly, Schroeder said that Davis had been promoted because he was the most eligible (Tr. 19).

It is clear from the record that Davis was a leading union adherent among the Company's employees (see *supra,* p. 3). It is likewise evident that immediately after hiring as a foreman John Womack, who had personal knowledge of Davis' union adherence, the Company, through Eichar and Schroeder, proceeded to subject Davis to a series of unlawful interrogations, threats and promises of benefits designed to discourage his union adherence. See *supra,* pp. 4 - 5. When Davis was discharged on July 16, Connor said nothing about failings as a worker but only that Davis was "a big problem" (R. 18;Tr. 250-251). Even though pushed for a more definite explanation, Connor told Davis simply that "I can't commit myself, you talk too much on the job." (R. 18; Tr. 22).

---

[13] Accord: *Shattuck Denn Mining Corp., supra,* 362 F.2d at 470; *N.L.R.B. v. Mrak Coal Co.,* 322 F.2d 311, 313, 314 (C.A. 9); *Bon Hennings Logging Co. v. N.L.R.B.,* 308 F.2d 548, 553-554 (C.A. 9).

This evidence, the Board properly concluded, established prima facie that Davis' discharge was attributable to his unionism. Hence it became incumbent upon the Company, if it would avoid that result, to come forward with a valid explanation for the discharge. The "real reason lay exclusively within its knowledge." *Montgomery Ward & Co. v. N.L.R.B.*, 107 F.2d 555, 569 (C.A. 7), citing *N.L.R.B. v. Remington Rand Inc.*, 94 F.2d 826, 872 (C.A. 2), cert denied, 304 U.S. 576.

However, the explanation offered by Company witnesses was, the Examiner found, incredible. Thus, Connor, who effected the discharge, attributed it to alleged wanton destruction of lumber (R. 18; Tr. 246). Connor testified that he saw Davis deliberately destroy about 1000 feet of lumber on July 16, and Hartwig claimed that a day or two before that he saw Davis ruin five times that much lumber and so reported to Connor (Tr. 211, 249-250). The Trial Examiner discredited this testimony, noting that although the claimed misconduct was both grave and continuing and would have cost the Company many hundreds of dollars, neither Connor nor Hartwig acted immediately upon making their alleged observations, and that remarkably enough Connor did not even mention it when Davis was discharged (R. 18-19).[14] To be sure, the record shows that Davis had a hasty temper, had a tendency to blow the millwright's whistle for help to a greater degree than the Company thought necessary, and had experienced some difficulties with the lugs on the trim saw (refusing in one instance to fix them himself because of the danger involved and his previous

---

[14] Employee Cook testified that it would have taken ½ hour for Davis to have slashed through 5000 feet of lumber, and in that time everyone would have noted either a backlog or absence of lumber (Tr. 394-395). Moreover, Hartwig's purported observations of malfeasance by Davis were, by Hartwig's own account, made from a catwalk 30 feet above the mill floor and from a point on that catwalk which was 80 feet laterally across the mill floor (Tr. 221-223, Appendix B, *infra*, pp. B1-B2). From this distance and angle, according to Hartwig, he could see a split in a board no wider than a pencil line, and thus could judge the grade of lumber going through Davis' machine (Tr. 226-227).

instructions from Eichar) (R. 17, 18, 19; Tr. 379, 213-214, 280-281, 52). However, the Company did not assign any of these as reason for Davis' discharge. As this Court has often stated, "the existence of some justifiable ground for discharge is no defense if it was not the moving cause." *N.L.R.B. v. Security Plating Co., supra,* 356 F.2d at 728, and cases cited therein. Accord: *Aeronca Mfg. Co. v. N.L.R.B.,* 385 F.2d 724, 727 (C.A. 9); *N.L.R.B. v. Isis Plumbing & Heating Co.,* 322 F.2d 913, 922 (C.A. 9).[15]

In sum, the Company's action stands without any credible explanation. Indeed, the Board's inference that Davis' termination was motivated by his union adherence gains strong support from the failure of the reason advanced by the Company to withstand scrutiny. See, *N.L.R.B. v. Dant & Russell, Ltd.,* 207 F.2d 165, 167 (C.A. 9); *N.L.R.B. v. Sebastopol Apple Growers Union, supra,* 269 F.2d at 710; *N.L.R.B. v. Griggs Equipment Co., Inc.,* 307 F.2d 275, 278 (C.A. 5).

"Thus," as the Board found, "the discharge of Davis is left unexplained unless it is found rooted in discriminatory considerations, the only apparent explanation that is fairly

---

[15] There is no substance to the Company's contention that the Trial Examiner erred in excluding testimony regarding Davis' employment elsewhere before he was hired by the Company and subsequent to his discharge on July 16. As to Davis' prior employment, company counsel questioned a company foreman who had been Davis' supervisor at a previous place of employment, asking the foreman "what if anything" he could say "about the quality of Mr. Davis' work" based on that prior experience (Tr. 343). When the foreman admitted that he had had nothing to do with Davis' discharge by the Company and, further, that he had not told the Company's management "what kind of a fellow Davis was or what kind of a worker he was" (*ibid.*), the Trial Examiner sustained objection to the above-quoted question. As the materiality of the information sought is not apparent, and the Company made no proffer of what it intended to adduce, the Examiner's ruling was plainly correct (Tr. 343-344). Similarly without apparent materiality was the testimony sought to be adduced from Davis as to where he went to work after being fired by the Company (Tr. 57-58). Again the Company made no offer of proof, simply asserting that "whether or not [Davis] was able to hold onto a job" was "relevant to whether or not the Company had a justifiable basis for discharging him" (*ibid.*). On this inadequate showing, the Examiner was surely acting within his allowable discretion in limiting exploration of remote events. Cf., *N.L.R.B. v. Champa Linen Service,* 324 F.2d 28, 30 (C.A. 10). Moreover, even if the excluded testimony was intended to show Davis as hotheaded during other employment, the Examiner accepted testimony by Foreman Connor and Millwright Hartwig that Davis had a hasty temper and was sometimes careless during his tenure at the Company (R. 17, 19). Hence the Company can hardly have been prejudiced by the evidentiary rulings here.

inferable from the evidence adverted to above" (R. 30). As this Court stated in *Shattuck Denn Mining Corp. v. N.L.R.B., supra,* 362 F.2d at 470:

> Nor is the trier of fact . . . required to be any more naif than is the judge. If he finds the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal – an unlawful motive – at least where . . . the surrounding facts tend to reinforce that inference . . . .

In the instant case, the Board could properly draw that inference, and reasonably conclude that "Davis' discharge was motivated by his pro-union sentiments and his resistance to the threats and blandishments designed to bring him over to [the Company's] side" (R. 29).[16]

---

[16] The Board was not required to deny Davis the normal remedy of reinstatement with back pay simply because, in a telephone conversation after his discriminatory discharge, Davis threatened to "beat up" Superintendent Eichar for giving him a poor recommendation (Tr. 61-62). Intemperate employee reaction to unlawful discrimination does not bar the usual remedies. As the Court of Appeals for the Fourth Circuit has stated of similar circumstances (*N.L.R.B. v. M. & B. Headwear Co.,* 349 F.2d 170, 174):

> An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment . . . . The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression . . . . [R]efusal to reinstate her would put a premium on the employer's misconduct.

Accord, *N.L.R.B. v. Morrison Cafeteria Co.,* 311 F.2d 534, 538 (C.A. 8) (employee cursed and offered to fight supervisor); *J.P. Stevens & Co., Inc.,* 157 NLRB 869, 878 n. 8, enforced as modified in respects not here material, 380 F.2d 292 (C.A. 2) (employee slapped supervisor). See also, *Oneita Knitting Mills, Inc. v. N.L.R.B.,* 375 F.2d 385, 389-391 (C.A. 4), and cases cited therein.

III. THE BOARD'S ORDER IS PROPER

The Board's order, adopting in this respect the recommended order of the Trial Examiner, directs the Company to cease and desist from the unfair labor practices found and from interfering "in any other manner" with employees' statutory rights. Before the Board, the Company excepted with particularity to the separate findings of the Trial Examiner, but did not specifically except or refer to any portion of the Trial Examiner's recommended order (see R. 26-27). Accordingly, Section 10(e) of the Act and the Board's implementing rules preclude consideration of that issue here.

Section 10(e) provides that "No objection that has not been urged before the Board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." And see NLRB Rules and Regulations, Series 8, as amended, Sections 102.46(a)(b) and (h), and 102.48(a), 29 C.F.R. Sections 102.46(a)(b)(h) and 102.48(a). The purpose of requiring the filing of exceptions to the Trial Examiner's decision is to insure that the Board is given an opportunity to exercise its statutory decision-making function on all relevant issues prior to judicial review. See, *N.L.R.B. v. Cheney California Lumber Co.,* 327 U.S. 385, 389; *U.S. v. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37. The Supreme Court has uniformly held that, at least when the Board has not "patently travelled outside the orbit of its authority" (*N.L.R.B. v. Cheney California Lumber Co.,* 327 U.S. 385, 388), absent "extraordinary circumstances" the failure or neglect of the respondent to urge an objection in the Board's proceedings forecloses judicial consideration of the objection in enforcement proceedings. *May Department Stores, Inc. v. N.L.R.B.,* 326 U.S. 376. Accordingly, as the Company failed to except to the breadth of the Examiner's recommended order, the propriety of the Board's adoption of that broad order may not be litigated before the reviewing court. *N.L.R.B. v. Local 476, United Ass'n of Journeymen etc.,* 368 U.S. 401; *N.L.R.B. v. Ochoa Fertilizer Corp.,* 368 U.S. 318, 322.

Furthermore, the Company cannot reasonably complain about the Board's expansion of the Examiner's recommended order to include specific prohibitions against discouraging its employees' membership in the Union or any other labor organization by discharging or in any other manner discriminating against them. If, as the Board found, Davis' discharge was violative of Section 8(a) (3) and (1) of the Act, such remedial provisions designed to prevent like or related conduct are plainly appropriate and within the Board "discretionary authority to fashion remedies to purge unfair labor practices." *N.L.R.B. v. District 50, United Mine Workers,* 355 U.S. 453, 458. For "[i]t is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 436. This "salutary principle" warrants the specific restraints which the Board here imposed. See *Marshfield Steel Co. v. N.L.R.B.,* 324 F.2d 333, 339 (C.A. 8); *N.L.R.B. v. Standard Metal Fabricating Co.*, 297 F.2d 365, 367 (C.A. 8).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

JANET KOHN,
HERBERT. FISHGOLD,
Attorneys,

National Labor Relations Board.

April, 1968

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,

National Labor Relations Board.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer —

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * *

[Sec. 10]

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief of restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

The following portions of the original transcript in Board Case No. 20-CA-3728 were inadvertently omitted from the reproduced transcript.

C. Hartwig for Respondent, Cross,

[221]

Q. [By Mr. Kintz] There is a file shop?

A. Filing room.

Q. Where you file saws?

A. Right.

Q. Is that on the first catwalk?

A. No, it is on the second catwalk, clear on the top of the mill.

Q. How far up is that?

A. Oh, it must be 30 feet.

Q. From the floor of the mill?

A. From the floor of the mill.

Q. It was up there that you were standing on the day – the 16th of July – the last day Jerry was working?

A. Right.

Q. Is that where you were watching?

A. Yes, right.

Q. And were you right over the top of the trimmer?

A. No, I wasn't right over the top of the trimmer because every time you would get over that place, why, he could see you.

[222]

Q. So you were back a ways?

A. I got back a ways from him.

Q. Turning around and looking at that diagram behind you, show us about where you were.

A. Well, that shows the floor of the mill. That doesn't show any of the catwalks.

Q. I assume from what you said, Mr. Hartwig, that this is a two-dimension drawing. We understand that you have to have a third dimension to show the catwalk. I notice here in the top center of the drawing is the trimmer. From what you said, you weren't immediately above that. I assume you were above one of the other parts.

A. I was about right here above the trimmer. You see the catwalk is on a way up above.

Q. You were actually over the edgerman?

A. The edgerman is just outside the filing room door. I was at the filing room door.

Q. You were about 30 feet in the air above the floor of the mill where the edgerman is situated, is that right?

A. Right.

Q. How far – How wide is the mill from the hula saw to the edger resaw?

A. 70 feet.

Q. The mill is also about 70 feet wide, is that right?

A. Right.

[223]

Q. And I see the edger is not directly on the far wall of the mill from the trimmer but is a little further down toward one end; is that right?

A. Right.

Q. I assume then from the appearance of that diagram that the edger should be about 80 feet across the floor from the trimmer or more; is that right?

A. Oh, about.

Q. About 80 feet or more across the floor from the trimmer to the edger and then you were 30 feet up in the air; is that right?

A. (Witness nodding affirmatively.)

APPENDIX C

INDEX TO REPORTER'S TRANSCRIPT
(Numbers to pages of the
reporter's transcript)

Board Case No. 20-CA-3728

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1A thru 1I	4	4	4
2	10		
3	67	66	67
4	67	67	67
5	70		
6	106	rejected p. 106	
7	319		

RESPONDENT'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1	164	386	387
2	141	141	141
3	163	162	163
4	180	180	180
5	326	326	326

CASILLAS PRESS, INC.
1000 Connecticut Avenue Building
1717 K Street, N. W.
Washington, D. C. 20006
223-1220